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## Rizzo v. Haines: An Attorney's Duty to Exercise Ordinary Skill and Knowledge in the Conduct of Settlement Negotiations

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1990]

## Recent Developments

### RIZZO v. HAINES: AN ATTORNEY'S DUTY TO EXERCISE ORDINARY SKILL AND KNOWLEDGE IN THE CONDUCT OF SETTLEMENT NEGOTIATIONS

#### I. INTRODUCTION

Attorneys have always been called upon to perform many diverse functions with differing responsibilities.<sup>1</sup> Recently, attorneys practicing in Pennsylvania and nationwide have also had to contend with an increasing number of legal malpractice actions.<sup>2</sup> This trend has been specifically evident in the increase of malpractice actions involving settlement negotiations.<sup>3</sup> Therefore, of particular importance to the at-

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1. PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT Preamble: A Lawyer's Responsibilities (1987), *reprinted in* 42 PA. CONS. STAT. ANN. (Purdon Supp. 1989). The Preamble specifically states:

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others.

*Id.*

2. Bogutz & Albert, *A Survey of the Developing Pennsylvania Law of Attorney Malpractice*, 61 TEMP. L. REV. 1237, 1237-38 (1988) ("Since the latter part of the 1960's, the number and variety of legal malpractice claims against Pennsylvania attorneys has risen at a rapid rate."). For an interesting graphic display of the increasing incidence of legal malpractice suits, see R. MALLEN & V. LEVIT, LEGAL MALPRACTICE § 6, at 19, 21 (2d ed. 1981).

Courts have held attorneys liable for their negligence in a variety of situations. *See, e.g.*, Williams v. Bashman, 457 F. Supp. 322 (E.D. Pa. 1978) (applying Pennsylvania law) (law firm liable to former client for failure to file claim within statute-of-limitations period); Curran v. Stradley, Ronon, Stevens & Young, 361 Pa. Super. 17, 521 A.2d 451 (1987) (law firm's failure through series of representations, acts and inaction to adequately represent client's interests in selling business supported claim for legal malpractice); Zurich Gen. Accident & Liab. Ins. Co. v. Klein, 181 Pa. Super. 48, 121 A.2d 893 (1956) (attorney liable for failure to discover tax lien on property purchased by client). The courts, however, have been careful to emphasize that an attorney is never liable to a client for the mere failure to win a case. *See, e.g.*, Gans v. Gray, 612 F. Supp. 608, 623 (E.D. Pa. 1985) (applying Pennsylvania law) ("To allow a plaintiff to bring a legal malpractice action against his attorney merely because he obtained an unfavorable jury verdict would seriously impair the functioning of the judicial system."); Hulstrand, Anderson, Larson & Boyland v. Rodgers, 386 N.W.2d 302, 304 (Minn. App. 1986) ("The mere fact that [an attorney] lost his case does not establish negligence.").

3. Annotation, *Legal Malpractice in Settling or Failing to Settle Client's Case*, 87 A.L.R.3d 168, 172-73 (1978) ("[T]here is a general trend toward increasing litigation and liability of attorneys for malpractice in cases involving the settlement

torney practicing in Pennsylvania is the Pennsylvania Supreme Court's recent decision in *Rizzo v. Haines*<sup>4</sup> regarding legal malpractice and settlement negotiations.

In *Rizzo*, the court adopted a three-element test that a client-plaintiff alleging negligence must meet in order to recover for legal malpractice.<sup>5</sup> In addition, the court held that an attorney must use ordinary skill and knowledge in the conduct of settlement negotiations, and that this standard requires that an attorney communicate and investigate all settlement offers.<sup>6</sup> The court further determined that an aggrieved client need not produce expert testimony to prove an attorney's breach of the duties to investigate and communicate settlement offers.<sup>7</sup> Finally, the court held that in order to recover for legal malpractice, an aggrieved client must prove actual, not speculative, damages.<sup>8</sup>

This article examines the analysis employed by the Pennsylvania Supreme Court in *Rizzo* and demonstrates the impact of *Rizzo* on the practicing attorney.<sup>9</sup> This article submits that *Rizzo* was correctly decided and that an attorney can be held liable for legal malpractice for failing to investigate or communicate a settlement offer. Additionally, while the *Rizzo* court failed to decide the issue, this article suggests that an attorney should be liable for legal malpractice for unreasonably increasing a settlement demand.<sup>10</sup>

## II. BACKGROUND

### A. Malpractice and Settlement

In Pennsylvania an aggrieved client may sue his or her attorney for

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or compromise of a client's case"). For a general discussion of legal malpractice, see Annotation, *Attorney's Liability for Negligence in Preparing or Conducting Litigation*, 45 A.L.R.2d 5 (1956) and later case service (1980).

4. 520 Pa. 484, 555 A.2d 58 (1989). Justice Stout wrote for the majority in *Rizzo*.

This article will only address the issues surrounding the negligent conduct of settlement negotiations discussed in *Rizzo*. It does not address the issues of recusal and an attorney's financial transactions with his client which were also discussed in *Rizzo*.

5. 520 Pa. at 499, 555 A.2d at 65. For a discussion of this test, see *infra* notes 55-60 and accompanying text.

6. 520 Pa. at 499-500, 555 A.2d at 65-66. For a discussion of the relationship between legal malpractice and the conduct of settlement negotiations, see *infra* notes 61-70 and accompanying text. For a discussion of an attorney's duty to communicate and investigate all settlement offers, see *infra* notes 66-70 and accompanying text.

7. 520 Pa. at 502, 555 A.2d at 66-67. For a discussion of the requirement of expert testimony, see *infra* notes 76-83 & 112-18 and accompanying text.

8. 520 Pa. at 504-05, 555 A.2d at 68. For a discussion of the damages requirement for a legal malpractice claim, see *infra* notes 88-96 and accompanying text.

9. See *infra* notes 100-18 and accompanying text.

10. See *infra* notes 106-11 and accompanying text.

malpractice under either an assumpsit or trespass theory.<sup>11</sup> To maintain a legal malpractice action in assumpsit, the plaintiff must prove there was a contract and that the defendant attorney breached a specific provision of that contract.<sup>12</sup> However, to maintain an action in trespass, the plaintiff must show that the attorney failed to exercise the proper standard of care.<sup>13</sup> Furthermore, to maintain any legal malpractice action, the plaintiff must prove "an attorney-client relationship or a specific undertaking by the attorney furnishing professional services."<sup>14</sup> Generally, an attorney-client relationship can be proven by evidence of the payment of a fee to the defendant attorney.<sup>15</sup> Moreover, "[i]n any cause of action for malpractice, some harm must be shown to have occurred to the [plaintiff]."<sup>16</sup>

11. *Guy v. Liederbach*, 501 Pa. 47, 55, 459 A.2d 744, 748 (1983); *Duke & Co. v. Anderson*, 275 Pa. Super. 65, 70, 418 A.2d 613, 616 (1980).

12. *Sherman Indus. v. Goldhammer*, 683 F. Supp. 502, 506 (E.D. Pa. 1988) (applying Pennsylvania law); *Duke*, 275 Pa. Super. at 70, 418 A.2d at 616. A plaintiff might prefer to bring an action in assumpsit rather than trespass because of the availability of a longer statute of limitations. See *Goldhammer*, 683 F. Supp. at 505-06.

13. *Goldhammer*, 683 F. Supp. at 506; *Duke*, 275 Pa. Super. at 70, 418 A.2d at 616.

14. *Guy*, 501 Pa. at 58, 459 A.2d at 750. *Guy* concerned the named beneficiary-executrix of a will who sued the attorney who had drafted the will and had asked her to witness it. *Id.* at 50, 459 A.2d at 746. By witnessing the will she ultimately voided her entire legacy and appointment as executrix. *Id.* The *Guy* court held that the named beneficiaries of a will who lose their intended legacy due to an attorney's negligence can bring suit against that attorney under a contractual third-party beneficiary theory. *Id.* at 62-63, 459 A.2d at 752-53. In this regard, the court adopted the view expressed in the *Restatement (Second) of Contracts*. *Id.* at 59, 459 A.2d at 751 (citing RESTATEMENT (SECOND) OF CONTRACTS § 302 (1979)). For a discussion of *Guy*, see Bogutz & Albert, *supra* note 2, at 1240-43. For a general discussion of the requirement of an attorney-client relationship for a legal malpractice suit, see D. MEISELMAN, ATTORNEY MALPRACTICE: LAW AND PROCEDURE §§ 1:1-1:5, at 1-12 (1980).

15. *Lawall v. Groman*, 180 Pa. 532, 537-38, 37 A. 98, 98 (1897). The court specifically stated:

The payment of a fee is the most usual and weighty item of evidence to establish the relationship of client and attorney, but it is by no means indispensable. The essential feature of the professional relation is the fact of employment to do something in the client's behalf. There must be an agreement, express or implied, for compensation, but whether payment is made in part or in whole by retainer in advance is not material.

*Id.* at 538, 37 A. at 98; see *Pennsylvania Power & Light Co. v. Gulf Oil Corp.*, 36 Lehigh. L.J. 461, 466, 74 Pa. D. & C.2d 431, 437 (C.P. 1975) ("Although the relationship of attorney and client may be implied from the conduct of the parties, such conduct must evidence an offer or request by the client for legal services and an acceptance of the offer by the attorney.") (citations omitted).

16. *Guy*, 501 Pa. at 56, 459 A.2d at 749; see *Duke*, 275 Pa. Super. at 73-74, 418 A.2d at 617 ("[A]n essential element of the cause of action, whether the action be denominated in assumpsit or trespass, is proof of actual loss.") (citations omitted). For a discussion of the *Rizzo* court's elaboration on the requirement of actual loss, see *infra* notes 88-96 and accompanying text.

Since malpractice suits arise regarding many aspects of settlement,<sup>17</sup> an attorney should understand the basic concepts behind settlement. A settlement is a contract which if valid concludes the parties' litigation according to its terms.<sup>18</sup> Pennsylvania permits a pending legal claim to be settled and compromised by a valid contract of settlement.<sup>19</sup> In fact, it is the public policy of Pennsylvania to encourage settlements for at least two reasons.<sup>20</sup> The first, and most important, reason is that settlement is the quickest way to get money into the hands of a victim of a tortious act.<sup>21</sup> The second reason is the need to reduce the burden on, and the expense of maintaining, the judicial system.<sup>22</sup>

A settlement agreement, voluntarily entered into, is binding upon the parties, whether or not made in the presence of or approved by the court,<sup>23</sup> and whether or not it is in writing.<sup>24</sup> Furthermore, a valid settlement agreement is conclusive and terminates the litigation not only as to those matters actually litigated, but also as to those which could have been litigated.<sup>25</sup> To be valid and enforceable, a settlement agreement "must possess all of the elements of a valid contract, and like any other

17. See H. MILLER, ART OF ADVOCACY: SETTLEMENT § 16.40 (1983).

18. *Gentile v. Silberman*, 59 Lack. Jur. 209, 211 (Pa. C.P. 1958). For a general discussion on settling a law suit, see C. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT (1986).

19. *Bearoff v. Bearoff Bros.*, 458 Pa. 494, 500 n.3, 327 A.2d 72, 76 n.3 (1974); see *Barson's & Overbrook, Inc. v. Arce Sales Corp.*, 227 Pa. Super. 309, 312, 324 A.2d 467, 468 (1974) ("Parties to an action may compromise a pending legal claim by entering into a valid contract of settlement.").

20. *Castillo v. Roger Constr. Co.*, 560 F.2d 1146, 1152 (3d Cir. 1977) (applying Pennsylvania law).

21. *Id.*

22. *Id.* at 1153; see *Walther & CIE v. United States Fidelity & Guar. Co.*, 397 F. Supp. 937, 946 (M.D. Pa. 1975) ("The negotiation of a settlement is a part of a judicial proceeding and is a judicially-favored way of disposing of litigation.").

23. *Albright v. R.J. Reynolds Tobacco Co.*, 350 F. Supp. 341, 348 (W.D. Pa. 1972) (applying Pennsylvania law) ("no court approval [of a settlement agreement] is necessary under Pennsylvania law") (citations omitted), *aff'd without opinion*, 485 F.2d 678 (3d Cir. 1973), *cert. denied*, 416 U.S. 951 (1974). In certain situations, such as cases involving minors or incompetents, judicial approval of settlements is required. See H. MILLER, *supra* note 17, §§ 17.70, 17.71; see also *Marquez v. Hahnemann Medical College & Hosp.*, 56 Pa. Commw. 188, 424 A.2d 975 (1981) (settlement of action to which minor is party requires either administrative approval or judicial approval, depending on the type of action).

24. *Pugh v. Super Fresh Food Mkts*, 640 F. Supp. 1306, 1307 (E.D. Pa. 1986) (applying Pennsylvania law) (citation omitted); *Kazanjian v. New England Petroleum Corp.*, 332 Pa. Super. 1, 10, 480 A.2d 1153, 1158 (1984) ("[O]ral settlement agreement is enforceable only if the parties, through their respective counsel, assented to the terms and if a writing was not a condition of the contract.").

25. *Albright*, 350 F. Supp. at 348 (settlement agreement is conclusive and not subject to collateral attack) (citations omitted); *Sustrik v. Jones & Laughlin Steel Corp.*, 413 Pa. 324, 326-27, 197 A.2d 44, 46 (1964) (Settlement is "conclusive, not only as to those matters that actually were litigated, but also of those matters which could have been litigated therein.") (citations omitted); see *Morris v. Gaspero*, 522 F. Supp. 121, 125 (E.D. Pa. 1981) (settlement agreement extin-

agreement it may be attacked for want of authority or consideration, or on equitable grounds warranting that it be set aside."<sup>26</sup>

An attorney generally cannot, absent express authorization from the client, settle a case.<sup>27</sup> An attorney must have express authorization since "the litigant is the complete master of his own cause of action in matters of substance; he may press it to the very end regardless of the facts and law arrayed against him."<sup>28</sup> However, the courts have enforced settlement agreements entered into by attorneys without authorization. For example, in *Rothman v. Fillette*<sup>29</sup> the plaintiff's attorney entered into an unauthorized settlement agreement and absconded with the settlement payment after forging the plaintiff's signature on a release.<sup>30</sup> Subsequently, the plaintiff sought to set aside the settlement agreement and have his action reinstated against the defendants.<sup>31</sup> The Pennsylvania Supreme Court refused to set aside the settlement agree-

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guishes asserted cause of action and fixes rights and interests of respective parties in accordance with terms of agreement).

26. *Sale v. Ambler*, 335 Pa. 165, 169, 6 A.2d 519, 521 (1939) (citations omitted); *see School Dist. v. Framlau Corp.*, 15 Pa. Commw. 621, 627, 328 A.2d 866, 870 (1974) ("A settlement of litigation is a compromise agreement comprised of all the traditional elements of a contract.") (citation omitted). *Contra Pugh v. Super Fresh Food Mkts*, 640 F. Supp. 1306, 1308 (E.D. Pa. 1986) (applying Pennsylvania law) ("The only essential prerequisite for a valid agreement is that the parties mutually assent to the terms and conditions of the settlement.") (citation omitted). "[A] contract is enforceable when the parties reach mutual agreement, exchange consideration and have outlined the terms of their bargain with sufficient clarity." *Greene v. Oliver Realty, Inc.*, 363 Pa. Super. 534, 539, 526 A.2d 1192, 1194, *alloc. denied*, 517 Pa. 607, 536 A.2d 1331 (1987).

27. *International Org. Masters, Mates & Pilots, Local No. 2 v. International Org. Masters, Mates & Pilots, Inc.*, 456 Pa. 436, 441, 318 A.2d 918, 921 (1974). The attorney-client relationship alone does not give an attorney the authority to settle a client's case. *Garabedian v. Allstates Eng'g Co.*, 811 F.2d 802, 803 (3d Cir. 1987) (citing *Holker v. Parker*, 11 U.S. (7 Cranch) 436, 452 (1813)); *Smith v. Delaware Valley Auto Spring Co.*, 642 F. Supp. 1112, 1115 (E.D. Pa. 1986) (applying Pennsylvania law) ("An attorney-client relationship does not, without more, confer upon the attorney the authority to settle his client's case.") (citations omitted).

A client who has not authorized a settlement will, however, be bound by it if he subsequently ratifies or accepts it. *Appeal of Scott Township*, 31 Pa. Commw. 505, 509, 377 A.2d 826, 827 (1977) ("[W]here a litigant does not attempt to repudiate immediately the authority of his counsel to enter into a settlement, but rather accepts benefits flowing from the settlement, he ratifies the act of his attorney and will not later be heard to complain that the attorney acted without authority.") (citations omitted); D. MEISELMAN, *supra* note 14, § 10:6, at 171. Such acceptance or ratification must be knowledgeable and informed. *Id.*

The Pennsylvania courts will, however, enforce a settlement agreement even absent express authorization or subsequent ratification. *See infra* notes 29-34 and accompanying text.

28. *Archbishop v. Karlak*, 450 Pa. 535, 539, 299 A.2d 294, 296 (1973). For a discussion of *Karlak*, *see infra* note 67.

29. 503 Pa. 259, 469 A.2d 543 (1983).

30. *Id.* at 263, 469 A.2d at 544-45.

31. *Id.*, 469 A.2d at 545.

ment.<sup>32</sup> The court explained that it “believe[d] applicable . . . the long recognized principle that where one of two innocent persons must suffer because of the fraud of a third, the one who has accredited [the third] must bear the loss.”<sup>33</sup> Therefore, the client bears the risk of an unauthorized settlement agreement.<sup>34</sup> The courts will set aside a settlement agreement only when there is a clear showing of mutual mistake, or fraud or duress on behalf of the party seeking to enforce the agreement.<sup>35</sup>

### B. Rizzo v. Haines

In *Rizzo v. Haines*, Frank L. Rizzo sued the City of Philadelphia (the

32. *Id.* at 266, 469 A.2d at 546.

33. *Id.* at 265, 469 A.2d at 545 (citations omitted); see *Manzitti v. Amsler*, 379 Pa. Super. 454, 469, 550 A.2d 537, 544 (1988), *alloc. granted*, 561 A.2d 742 (Pa. 1989). *But see* *Archbishop v. Karlack*, 450 Pa. 535, 539, 299 A.2d 294, 296 (1973) (court vacated consent decree entered into by attorneys without their clients' consent).

In *Manzitti*, the plaintiff husband had brought a medical malpractice action against a physician and hospital for personal injuries, while the plaintiff's wife jointly filed a claim for loss of consortium. 379 Pa. Super. at 455-56, 550 A.2d at 537. The plaintiffs' attorney settled the case, but the plaintiffs alleged that the attorney only had authorization to settle the husband's claim. *Id.* at 456-57, 550 A.2d at 538. Thereafter, the defendant doctor and hospital petitioned the trial court to enforce the agreement, though no payment had yet been made in reliance on the agreement. *Id.* at 457, 550 A.2d at 538. The Superior Court, applying *Rothman*, held that the settlement agreement was enforceable as to the plaintiff wife. *Id.* at 468-69, 550 A.2d at 544.

A separately filed opinion, however, pointed out a number of inconsistencies with the *Rothman* opinion and argued that unauthorized settlement agreements were unenforceable. See *id.* at 469-74, 550 A.2d 544-46 (Popovich, J., concurring and dissenting); see also *Newton v. Supermarkets General Corp.*, No. Civ. A. 88-4165 (E.D. Pa. Nov. 29, 1989) (WESTLAW, 1989 WL 144104) (Disagreeing with *Manzitti*, court stated “the majority in *Manzitti* engaged in an overly broad reading and unintended application of *Rothman*.”). The Pennsylvania Supreme Court has granted allocatur, but has not yet decided the case.

34. See *Manzitti*, 379 Pa. Super. at 469, 550 A.2d at 544 (Even assuming client “did not expressly authorize [attorney] to settle her claim, the settlement agreement nonetheless was still enforceable.”). The aggrieved client can, however, “rely upon the other procedures established . . . to provide punishment and to serve as a deterrent against repetition of such conduct.” *Rothman*, 503 Pa. at 268, 469 A.2d at 547. As one court has explained:

[A] third party who reaches a settlement agreement with an attorney employed to represent his client in regard to the settled claim is generally entitled to enforcement of the settlement agreement even if the attorney was acting contrary to the client's express instructions. In such a situation, the client's remedy is to sue his attorney for professional malpractice.

*Capital Dredge & Dock Corp. v. City of Detroit*, 800 F.2d 525, 530 (6th Cir. 1986) (applying Michigan law).

35. *Rago v. Nace*, 313 Pa. Super. 575, 578, 460 A.2d 337, 339 (1983); *Greentree Cinemas, Inc. v. Hakim*, 289 Pa. Super. 39, 42-43, 432 A.2d 1039, 1041 (1981) (Settlement agreement must, “in the absence of fraud and mistake, be sustained.”).

"City") for injuries he received when he was rear-ended by a police vehicle.<sup>36</sup> In an attempt to treat his injuries, Rizzo underwent three surgical procedures which left him partially paralyzed.<sup>37</sup> Barton A. Haines represented Rizzo in his lawsuits against the City and his doctor.<sup>38</sup>

Initially, with Rizzo's approval, Haines proposed \$1,200,000 as his client's settlement demand.<sup>39</sup> The City refused to pay that amount to settle the case.<sup>40</sup> Haines reiterated that demand at a pretrial settlement conference,<sup>41</sup> and the City responded by offering \$300,000 plus a lifetime pension, which Haines did not accept.<sup>42</sup> Haines later testified that, at the conference, he neither asked what was involved in the lifetime pension, nor whether the pension was similar to a structured settlement.<sup>43</sup> Soon after that conference, Haines wrote two letters to the City seeking another settlement offer and information regarding the pension.<sup>44</sup> At the second pretrial settlement conference, Haines, without Rizzo's authorization, raised the settlement demand to \$2,000,000.<sup>45</sup> The City's attorney responded by offering \$50,000 to settle the case.<sup>46</sup> After the fourth day of trial, another settlement conference was held, during which the trial judge offered to lend her assistance in obtaining settlement by estimating damages of \$550,000 for the case.<sup>47</sup> Haines, without first informing Rizzo, rejected this figure.<sup>48</sup> The City's attorney then stated that he was authorized to offer more than \$550,000 and asked Haines what he wanted.<sup>49</sup> Without inquiring how much more the City was willing to pay, Haines reiterated his demand for \$2,000,000.<sup>50</sup> The City's attorney later testified that he was authorized to settle at trial for \$750,000.<sup>51</sup>

In his action against the City, the jury returned a verdict in favor of

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36. 520 Pa. 484, 489, 555 A.2d 58, 60 (1989). The plaintiff-appellee is not related to the former Mayor of Philadelphia, Frank L. Rizzo. *Id.* at 489 n.1, 555 A.2d at 60 n.1.

37. *Id.* at 489, 555 A.2d at 60.

38. *Id.* at 489-90, 555 A.2d at 60.

39. *Id.* at 492, 555 A.2d at 61-62.

40. *Id.*, 555 A.2d at 62.

41. *Id.* at 493, 555 A.2d at 62.

42. *Id.*

43. *Id.* Haines explained that he did not inquire about the pension offer because Rizzo had previously applied for a disability pension and had been rejected. *Id.*

44. *Id.* The City's attorney did not respond to these two letters. *Id.*

45. *Id.* at 494, 555 A.2d at 62 (footnote omitted).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* Rizzo later testified that he had authorized Haines to settle the case for \$700,000 to \$750,000. *Id.*



Rizzo in the amount of \$450,000.<sup>52</sup> The lawsuit against the doctor was eventually dismissed on the grounds that Rizzo's recovery in the suit against the City had fully compensated him.<sup>53</sup> Rizzo then filed suit against Haines alleging the negligent conduct of settlement negotiations with the City.<sup>54</sup>

Initially, the Pennsylvania Supreme Court adopted a three-element test that a plaintiff alleging negligence must meet in order to recover for legal malpractice.<sup>55</sup> The plaintiff must prove: (1) the employment of the attorney or other basis for duty;<sup>56</sup> (2) the failure of the attorney to exercise ordinary skill and knowledge;<sup>57</sup> and (3) that such negligence

52. *Id.* at 490, 555 A.2d at 60. After the jury rendered its verdict, Haines assured Rizzo that his case against the doctor was still viable, and advised that Rizzo take the money. *Id.* Haines never filed any post-trial motions. *Id.*

53. *Id.* at 491, 555 A.2d at 61 (citing *Rizzo v. Rohrback*, 8 Pa. D. & C.3d 122 (C.P. Phila.), *aff'd without opinion*, 261 Pa. Super. 455, 395 A.2d 995 (1978)).

54. *Id.*

55. *Id.* at 499, 555 A.2d at 65 (citing *Schenkel v. Monheit*, 266 Pa. Super. 396, 399, 405 A.2d 493, 494 (1979)). This three-element test had originally been adopted by the federal courts in Pennsylvania and the Pennsylvania Superior Court. *See, e.g.*, *Gans v. Mundy*, 762 F.2d 338, 341 (3d Cir.) (applying Pennsylvania law) (quoting *Schenkel v. Monheit*, 266 Pa. Super. 396, 399, 405 A.2d 493, 494 (1979)), *cert. denied*, 474 U.S. 1010 (1985); *Storm v. Golden*, 371 Pa. Super. 368, 374-75, 538 A.2d 61, 64 (1988) (citations omitted); *Schenkel v. Monheit*, 266 Pa. Super. 396, 399, 405 A.2d 493, 494 (1979) (quoting R. MALLEN & V. LEVIT, *LEGAL MALPRACTICE* 123 (1977)). *Schenkel* was the first Pennsylvania case to adopt this test. *See Schenkel*, 266 Pa. Super. at 399, 405 A.2d at 494.

Many other states also require that these three elements be met to establish a legal malpractice claim. *See, e.g.*, *Phillips v. Clancy*, 152 Ariz. 415, 418, 733 P.2d 300, 303 (Ct. App. 1986); *Hatcher v. Roberts*, 478 So. 2d 1083, 1087 (Fla. Dist. Ct. App. 1985) (citation omitted), *review denied*, 488 So. 2d 68 (Fla. 1986); *Phillips v. Carson*, 240 Kan. 462, 476, 731 P.2d 820, 832 (1987) (citation omitted); *Cavacos v. Sarwar*, 313 Md. 248, 253, 545 A.2d 46, 48 (1988) (citations omitted); *Albright v. Burns*, 206 N.J. Super. 625, 632, 503 A.2d 386, 389 (App. Div. 1986) (citations omitted).

In addition to meeting these three elements, many states require proof of actual loss. *See, e.g.*, *Phillips*, 240 Kan. at 476, 731 P.2d at 832 (citation omitted). For a discussion of the requirement of actual loss in Pennsylvania, see *infra* notes 88-96 and accompanying text.

56. *Rizzo*, 520 Pa. at 499, 555 A.2d at 65; see *Guy v. Liederbach*, 501 Pa. 47, 58, 459 A.2d 744, 750 (1983) (attorney-client relationship required before plaintiff can maintain legal malpractice suit). For a discussion of *Guy*, see *supra* note 14 and accompanying text.

57. *Rizzo*, 520 Pa. at 499, 555 A.2d at 65. The exercise of ordinary skill and knowledge "is measured by the skill generally possessed and employed by practitioners of the profession." *Gans v. Mundy*, 762 F.2d 338, 341 (3d Cir.) (applying Pennsylvania law) (citation omitted), *cert. denied*, 474 U.S. 1010 (1985). It has been asserted that in determining whether an attorney exercised ordinary skill and knowledge, the Pennsylvania courts apply the "locality rule." *Bogutz & Albert, supra* note 2, at 1247-48. "The locality rule relies upon the commonly accepted practice among the attorneys practicing in the locale in which the attorney-defendant is located." *Id.* (footnote omitted); see R. MALLEN & V. LEVIT, *supra* note 2, § 254, at 333 ("Consideration of the locality, such as local rules, practice or custom, can determine the propriety of the attorney's conduct.")

was the proximate cause of damages to the plaintiff.<sup>58</sup> These elements

(footnote omitted). That is, if the defendant attorney acted in the same manner as other attorneys practicing in his locality, he will be found to have exercised ordinary skill and knowledge. See *Hoyer v. Frazee*, 323 Pa. Super. 421, 427, 470 A.2d 990, 993 (1984) (attorney did not breach duty to exercise ordinary skill and knowledge because he acted as other attorneys did in his county when facing same situation).

The locality rule has been criticized as "not necessarily related to the exercise of professional judgment," especially given the modern trend of specialization in the legal field. Bogutz & Albert, *supra* note 2, at 1249 (footnote omitted). It is uncertain whether the locality rule will continue to be the standard used by the Pennsylvania courts. *Id.*

In determining whether Haines exercised ordinary skill and knowledge in conducting the settlement negotiations, the *Rizzo* court did not rely on the locality rule. See *infra* note 68 and accompanying text.

58. *Rizzo*, 520 Pa. at 499, 555 A.2d at 65. Proximate causation is satisfied when the plaintiff proves that he would have prevailed or at least achieved a better result in the underlying litigation if the defendant attorney had exercised ordinary skill and knowledge. *Martin v. Northwest Wash. Legal Servs.*, 43 Wash. App. 405, 409, 717 P.2d 779, 782-83 (1986); see also *McHugh v. Litvin, Blumberg, Matusow & Young*, 379 Pa. Super. 95, 100, 549 A.2d 922, 924 (1988) (plaintiff failed to prove causation in legal malpractice action since she could not prove that she would have prevailed in underlying suit absent attorney's negligence), *alloc. granted*, 561 A.2d 742 (Pa. 1989). This third element has been called the "case within a case requirement." See, e.g., Bogutz & Albert, *supra* note 2, at 1254; see also *Harding v. Bell*, 265 Or. 202, 205, 508 P.2d 216, 217 (1973) ("[T]he client must show that he would have won the first suit as one step in order to win the second one.") (quoting J. WADE, "The Attorney's Liability for Negligence," PROFESSIONAL NEGLIGENCE 231-32 (Roady & Anderson ed. 1960)). This is the most difficult element for the plaintiff to meet. *Id.* at 204-05, 508 P.2d at 217. For a further discussion of the "case within a case requirement," see D. MEISELMAN, *supra* note 14, § 3:5, at 44-45.

It should be noted that the Pennsylvania Supreme Court has been urged not to adopt the "case within a case requirement" for proof of proximate causation. See *Ferencz v. Milie*, 517 Pa. 141, 145, 535 A.2d 59, 62 (1987). The court has refused to decide the issue. *Id.* at 151, 535 A.2d at 65. One proposed alternative to the "case within a case requirement" is the "substantial cause" test. Bogutz & Albert, *supra* note 2, at 1255 (explaining and criticizing proposed use of "substantial cause" test). The Pennsylvania Supreme Court has applied the "substantial cause" test for proof of proximate causation in medical malpractice litigation. See *Hamil v. Bashline*, 481 Pa. 256, 265, 392 A.2d 1280, 1284 (1978) (citations omitted).

It is interesting to note that on at least one occasion the Pennsylvania Superior Court has confused the third element with the requirement of an actual loss. See *Trice v. Mozenter*, 356 Pa. Super. 510, 517, 515 A.2d 10, 13 (1986) (that plaintiff must prove he would have prevailed in underlying action means that he must prove actual loss), *alloc. granted*, 514 Pa. 643, 523 A.2d 1132 (1987). The requirement of proximate causation is separate from the requirement of an actual loss. That is, proving an actual loss without proving causation is insufficient. See *Amfac Distribution Corp. v. Miller*, 138 Ariz. 152, 153, 673 P.2d 792, 793 (1983) ("Negligence alone is not actionable; actual injury or damages must be sustained . . ."); *Phillips v. Carson*, 240 Kan. 462, 476, 731 P.2d 820, 832 (1987) ("The elements of legal malpractice are . . . that the attorney's breach of duty proximately caused injury to the client; and that the client sustained actual damages.").

The two requirements, however, are connected. The proof of actual loss will involve "analysis of the value of [the] underlying cause of action."

are only a restatement of the traditional elements of negligence: duty, breach, causation and damages.<sup>59</sup> Although the Pennsylvania Supreme Court did not decide the issue, the plaintiff bears the burden of proving the elements by a preponderance of the evidence.<sup>60</sup>

The *Rizzo* court held that "the necessity for an attorney's use of ordinary skill and knowledge extends to the conduct of settlement negotiations."<sup>61</sup> It based this holding on both the importance of settlement to the maintenance of the judicial system and because "settlement is the faster way to get money into the hands of the victims of tortious conduct."<sup>62</sup> The court also recognized "that a disappointed client may be

Whiteaker v. State, 382 N.W.2d 112, 114 (Iowa 1986) (citation omitted); see *Williams v. Bashman*, 457 F. Supp. 322, 326 (E.D. Pa. 1978) (applying Pennsylvania law) (Plaintiff must prove "that he or she would have recovered a judgment in the underlying action in order to be awarded damages in the malpractice action, which are measured by the lost judgment.") (citation omitted). For a discussion of the actual loss requirement in a legal malpractice action for the negligent conduct of settlement negotiations, see *infra* notes 88-96 and accompanying text.

59. *Bowman v. Abramson*, 545 F. Supp. 227, 229 (E.D. Pa. 1982) (applying Pennsylvania law); see, e.g., *Malloy v. Sullivan*, 415 So. 2d 1059, 1060 (Ala.) ("The principle which governs a legal malpractice action based upon negligence is the same as in any other negligence action, the plaintiff having the burden of proving a duty, its breach which caused injury, and damages."), *cert. denied*, 459 U.S. 974 (1982).

60. *Rizzo v. Haines*, No. 79-623, slip op. at 28 (Pa. C.P. Phila. June 20, 1985), *aff'd in part and rev'd in part*, 357 Pa. Super. 57, 515 A.2d 321 (1986), *aff'd*, 520 Pa. 484, 555 A.2d 58 (1989); see *Hickox ex rel. Hickox v. Holleman*, 502 So. 2d 626, 633 (Miss. 1987) (plaintiff must prove elements of legal malpractice action by preponderance of evidence); *Progressive Sales, Inc. v. Williams, Willeford, Boger, Grady & Davis*, 86 N.C. App. 51, 55, 356 S.E.2d 372, 375 (1987) (same); *Olson v. Fraase*, 421 N.W.2d 820, 829 (N.D. 1988) (same) (citation omitted); cf. *Trice v. Mozenter*, 356 Pa. Super. 510, 517, 515 A.2d 10, 13 (1986) (plaintiff must establish by preponderance of the evidence that he would have prevailed in underlying action), *alloc. granted*, 514 Pa. 643, 523 A.2d 1132 (1987).

The preponderance of the evidence test has been described as "the lowest standard by which a party can carry the burden of persuasion." L. PACKEL & A. POULIN, PENNSYLVANIA EVIDENCE § 303.1, at 58 (1987) (footnote omitted). The test is met when "the jury finds that the pan on the plaintiff's side of the scales of justice has descended below the horizontal, while the defendant's dish has risen above the level plane." *O'Toole v. Borough of Braddock*, 397 Pa. 562, 564, 155 A.2d 848, 850 (1959).

61. *Rizzo*, 520 Pa. at 499, 555 A.2d at 65. The court explained that "the importance of settlement to the client and society mandates that an attorney utilize ordinary skill and knowledge." *Id.* at 500, 555 A.2d at 65-66. Numerous other courts have held that attorneys may be held liable for failing to exercise ordinary skill and knowledge or reasonable care in the conduct of settlement negotiations. See, e.g., *Whiteaker v. State*, 382 N.W.2d 112, 115-16 (Iowa 1986) (allowing malpractice suits against attorneys for failure to communicate settlement offers); *Arana v. Koerner*, 735 S.W.2d 729, 733 (Mo. App. 1987) (permitting malpractice suits against attorneys who settle cases without their clients' knowledge or consent); *Smith v. Ganz*, 219 Neb. 432, 436, 363 N.W.2d 526, 529-30 (1985) (allowing malpractice suits against attorneys for failure to communicate settlement offers).

62. 520 Pa. at 499-500, 555 A.2d at 65. Specifically, the court explained:

inclined to subject his or her attorney to the standard that only hindsight may provide, and as a general policy there should be judicial reluctance to relitigate suits in the guise of legal malpractice."<sup>63</sup> The court concluded that a decision which was an informed judgment and involved the exercise of ordinary skill and knowledge cannot constitute legal malpractice.<sup>64</sup> However, the court stated that "an attorney may not shield himself from liability in failing to exercise the requisite degree of professional skill in settling the case by asserting that he was merely following a certain strategy or exercising professional judgment."<sup>65</sup>

Justice Stout, writing for the court, found that as a matter of law, the duty to exercise ordinary skill and knowledge in the conduct of settlement negotiations required an attorney to communicate all settlement offers to the client.<sup>66</sup> The court explained that this requirement "derives from the settled principle that an attorney must have express authority from the client to settle the case."<sup>67</sup>

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[V]oluntary settlement of civil controversies is in high judicial favor. Judges and lawyers alike strive assiduously to promote amicable adjustments of matters in dispute, as for the most wholesome of reasons they certainly should. When the effort is successful, the parties avoid the expense and delay incidental to litigation of the issues; the court is spared the burdens of a trial and the preparation and proceedings that must forerun it.

*Id.* (quoting *Rothman v. Fillette*, 503 Pa. 259, 267, 469 A.2d 543, 546 (1983)). For a discussion on the importance of settlement agreements, see *supra* notes 19-22 and accompanying text.

63. *Rizzo*, 520 Pa. at 500, 555 A.2d at 65; see R. MALLEN & V. LEVIT, *supra* note 2, § 580, at 723 ("Some courts, recognizing the vulnerability of the litigation attorney to hindsight reflections by a disappointed client, have stated that as a matter of policy there should be judicial reluctance to relitigate as legal malpractice suits those cases which have once been settled or litigated.") (footnote omitted).

64. *Rizzo*, 520 Pa. at 500, 555 A.2d at 65 (citing *Gans v. Mundy*, 762 F.2d 338, 341 (3d Cir.), *cert. denied*, 474 U.S. 1010 (1985)).

65. *Id.* at 500, 555 A.2d at 65.

66. *Id.*, 555 A.2d at 66 (citations omitted).

67. *Id.* at 500-01, 555 A.2d at 66 (citing *Archbishop v. Karlack*, 450 Pa. 535, 299 A.2d 294 (1973)). In *Karlack*, the issue was whether the defendants were bound by a consent decree entered into by their attorneys without their permission. *Karlack*, 450 Pa. at 538-39, 299 A.2d at 296. The court held they were not, and explained that "the litigant is the complete master of his own cause of action in matters of substance; he may press it to the very end regardless of the facts and law arrayed against him." *Id.* at 539, 541-42, 299 A.2d at 296, 298. For a further discussion of an attorney's lack of authority to settle a case, see *supra* notes 27-35 and accompanying text.

The court also relied on three decisions from other jurisdictions. *Rizzo*, 520 Pa. at 500, 555 A.2d at 66. In *Whiteaker v. State*, 382 N.W.2d 112, 113 (Iowa 1986), the plaintiff sued the state for damages caused by the alleged malpractice of a state attorney. The plaintiff contended the state attorney was negligent for failing to inform him that the party he sued was willing to negotiate a settlement. *Id.* The court held that "[a]ttorneys handling claims certainly have an obligation to communicate settlement proposals to their clients." *Id.* at 115 (citations omitted). In the second case relied upon, *Joos v. Auto-Owners Ins. Co.*, 94 Mich.

The court further held that an attorney has a duty to investigate all settlement offers.<sup>68</sup> The *Rizzo* court explained that Haines had "a duty to take reasonable steps to investigate the inquiries or offers that the City extended . . . [s]ince the client's choice to accept or reject a settlement offer must be an informed one."<sup>69</sup> The court, however, cited no case that directly supported this holding.<sup>70</sup>

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App. 419, 421, 288 N.W.2d 443, 444 (1979), the plaintiff alleged legal malpractice because her attorney failed to inform her that the defendant in her personal injury suit was willing to settle. The court stated that "an attorney has, as a matter of law, a duty to disclose and discuss with his or her client good faith offers to settle." *Id.* at 424, 288 N.W.2d at 445 (footnote omitted). Finally, in the third case upon which the *Rizzo* court relied, the court stated that the "failure to disclose an offer of settlement and submit [it] to the client's judgment for acceptance or rejection is improper practice." *Rubenstein & Rubenstein v. Papadakos*, 31 A.D.2d 615, 615, 295 N.Y.S.2d 876, 877 (1968), *aff'd without opinion*, 25 N.Y.2d 751, 250 N.E.2d 570, 303 N.Y.S.2d 508 (1969).

The *Rizzo* court also relied upon the Pennsylvania Code of Professional Responsibility and the Pennsylvania Rules of Professional Conduct. *Rizzo*, 520 Pa. at 500 & n.9, 555 A.2d at 66 & n.9. The Code of Professional Responsibility states that "it is for the client to decide whether he will accept a settlement offer." PENNSYLVANIA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1974) (repealed). Similarly, the Rules of Professional Conduct provide that "[a] lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter." PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1987). For a discussion of the Pennsylvania Rules of Professional Conduct which have superseded the Pennsylvania Code of Professional Responsibility, see Packel, *Confidentiality under the Pennsylvania Attorney-Client Privilege Statutes and the New Pennsylvania Rules of Professional Conduct*, 34 VILL. L. REV. 91 (1989).

68. *Rizzo*, 520 Pa. at 501, 555 A.2d at 66 (citations omitted). In deciding that the exercise of ordinary skill and knowledge required Haines to communicate and investigate settlement offers, the court never referred to whether this was the common practice of attorneys in Haines' locality, Philadelphia. That is, the *Rizzo* court did not apply the "locality rule" in determining exactly what the exercise of ordinary skill and knowledge required in this case. It appears, therefore, that the court has set forth a state-wide rule that attorneys are under a duty to communicate and investigate settlement offers. For a discussion of the "locality rule," see *supra* note 57.

69. *Rizzo*, 520 Pa. at 501, 555 A.2d at 66.

70. *Id.* The court did, however, rely on *Snyder v. Queen Cutlery Co.*, 357 Pa. Super. 456, 516 A.2d 71 (1986). In *Snyder*, the plaintiffs brought a legal malpractice action against their attorney for failing to investigate the possibility of a personal injury claim against the manufacturer of a machine. *Id.* at 458, 516 A.2d at 73. The plaintiffs sought to compel the inspection of the place where the machine was located. *Id.* at 458-59, 516 A.2d at 73. In allowing the inspection, the Superior Court implicitly held that the failure to investigate a potential claim can be grounds for malpractice. See *id.* at 460-61, 516 A.2d at 74.

The *Rizzo* court also relied on *Giaramita v. Flow Master Machine Corp.*, 234 N.Y.S.2d 817 (Sup. Ct. 1962). In *Giaramita*, the plaintiffs sought to rescind a settlement they had entered into with the defendant on the grounds that they had incorrectly believed the defendant was in a poor financial condition. *Id.* at 818. In rejecting the plaintiffs' motion, the court stated that "[t]he responsibility to investigate and prepare every phase of plaintiffs' case is upon their attorney." *Id.*

Other courts have agreed with the *Giaramita* court and have held that an attorney has a duty to investigate a client's case. See, e.g., *Cline v. Watkins*, 66

The court found that Haines did not breach his duty to investigate the pension that the City had offered to settle the case.<sup>71</sup> Specifically, the court determined that Haines "took reasonable steps to ascertain the pension value."<sup>72</sup> However, the court found that Haines clearly breached his duty to investigate settlement offers when he failed to respond to the City attorney's comment at trial that Rizzo could get more than \$550,000 in settlement.<sup>73</sup> The court also found that Haines breached his duty to communicate this settlement offer to Rizzo.<sup>74</sup> Finally, the court concluded that "[s]ince the other elements of attorney malpractice have been met, we hold that breach of these duties is sufficient to support a malpractice action."<sup>75</sup>

The next issue the Pennsylvania Supreme Court faced was whether expert testimony was necessary to establish the breach of the standard of care with regard to the duties to investigate and communicate settlement offers.<sup>76</sup> The court noted the general rule that expert testimony is only essential where it will assist the finder of fact in comprehending an issue beyond the knowledge of the average person.<sup>77</sup> Justice Stout ex-

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Cal. App. 3d 174, 178 n.1, 135 Cal. Rptr. 838, 840 n.1 (1977) (attorney's standard of care required investigation of client's claim to relief in early stages of litigation); Parkville Mobile Modular, Inc. v. Fabricant, 73 A.D.2d 595, 598, 422 N.Y.S.2d 710, 715 (1979) (attorney's duty to prepare and investigate must be within "reasonable" bounds) (citations omitted), *appeal dismissed*, 49 N.Y.2d 801 (1980).

71. *Rizzo*, 520 Pa. at 501, 555 A.2d at 66.

72. *Id.* According to the court, the reasonable steps included informing the City of Rizzo's earnings and writing letters to the City's attorney seeking information as to what the pension offer encompassed. *Id.* Thus, Haines did not breach this duty by failing to ask what the pension offer encompassed at the pretrial settlement conference in which the offer was made. *Id.*

73. *Id.* The *Rizzo* court explained that "[d]espite the comment, [Haines] took no steps to ascertain how much 'more' the City was willing to pay." *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 501-02, 555 A.2d at 66-67. Expert testimony in legal malpractice cases refers to the testimony of attorneys. *Sanders v. Smith*, 83 N.M. 706, 708, 496 P.2d 1102, 1104 (Ct. App.), *cert. denied*, 83 N.M. 698, 496 P.2d 1094 (N.M. 1972); *Lenius v. King*, 294 N.W.2d 912, 914 (S.D. 1980) ("In a malpractice action the jury decides, from evidence presented at trial by other lawyers called as expert witnesses, whether a lawyer possessed and used the knowledge, skill, and care which the law demands of him."). For a discussion on the requirement of expert testimony in legal malpractice actions, see Annotation, *Admissibility and Necessity of Expert Evidence as to Standards of Practice and Negligence in Malpractice Action Against Attorney*, 14 A.L.R.4th 170 (1982).

77. *Rizzo*, 520 Pa. at 502, 555 A.2d at 66 (citing *Reardon v. Meehan*, 424 Pa. 460, 465, 227 A.2d 667, 670 (1967)). In *Reardon*, the plaintiff sued for injuries sustained from tripping over the defendants' rug. *Reardon*, 424 Pa. at 462, 227 A.2d at 668-69. At trial, an expert testified as to the condition of the rug and the defendants appealed the admission of this testimony. *Id.* at 464, 227 A.2d at 670. In rejecting the defendants' contention, the court explained that "[t]he employment of testimony of an expert rises from necessity, a necessity born of the fact that the subject matter of the inquiry is one involving special skills and training

plained that “[w]here the issue is simple, and the lack of skill obvious, the ordinary experience and comprehension of lay persons can establish the standard of care.”<sup>78</sup> The *Rizzo* court concluded “that [proving] breach of the dut[ies] to investigate, and to inform one’s client of, settlement offers does not require expert testimony.”<sup>79</sup> The court relied on *Joos v. Auto-Owners Insurance Co.*<sup>80</sup> in support of this conclusion.<sup>81</sup> The *Joos* court held that “[i]t is well within the ordinary knowledge and experience of a layman jury to recognize that . . . the failure of an attorney to disclose [settlement offers] is a breach of the professional standard of

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beyond the ken of the ordinary layman.” *Id.* at 465, 227 A.2d at 670 (citation omitted).

78. *Rizzo*, 520 Pa. at 502, 555 A.2d at 66 (citing *Lentino v. Fringe Employee Plans, Inc.*, 611 F.2d 474 (3d Cir. 1979) (applying Pennsylvania law)). *Lentino* involved a claim of legal malpractice against two attorneys for their failure to submit an employee retirement plan to the IRS for approval, and for suggesting payments in violation of that plan. *Lentino*, 611 F.2d at 477. The Third Circuit held that, in general, expert testimony is required to establish the standard of care and whether it was complied with “except where the matter under investigation is so simple, and the lack of skill so obvious, as to be within the range of the ordinary experience and comprehension of non-professional persons.” *Id.* at 480 (citations omitted). The *Lentino* court affirmed the trial court’s holding that expert testimony was required in that case and thus, for lack of it, the case was dismissed. *Id.* at 481; see *Reardon*, 424 Pa. at 465, 227 A.2d at 670 (“If all the primary facts can be accurately described to a jury and if the jury is as capable of comprehending and understanding such facts and drawing correct conclusions from them as are witnesses possessed of special training, experience or observation, then there is no need for [expert] testimony.”) (citations omitted).

79. *Rizzo*, 520 Pa. at 502, 555 A.2d at 66-67 (citations omitted). However, in most legal malpractice cases, including those involving settlement, expert testimony is necessary to establish the standard of care and its breach. See, e.g., *Applegate v. Dobrovir, Oakes & Gebhardt*, 628 F. Supp. 378, 382 (D.D.C. 1985) (expert testimony required where plaintiff alleged attorneys induced settlement), *aff’d without opinion*, 809 F.2d 930 (D.C. Cir.), *cert. denied*, 481 U.S. 1049 (1987); *Hughes v. Malone*, 146 Ga. App. 341, 345, 247 S.E.2d 107, 111 (1978) (“except in clear and palpable cases (such as the expiration of a statute of limitation), expert testimony is necessary to establish the parameters of acceptable professional conduct”) (citations omitted); *Spaulding v. Hussain*, 229 N.J. Super. 430, 443, 551 A.2d 1022, 1029 (App. Div. 1988) (determination of attorney’s negligence in accepting settlement required expert testimony); *Rorrer v. Cooke*, 313 N.C. 338, 356, 329 S.E.2d 355, 366-67 (1985) (expert testimony necessary to ascertain if attorney failed to exercise standard of care when he investigated client’s case); *Storm v. Golden*, 371 Pa. Super. 368, 375-76, 538 A.2d 61, 64 (1988) (expert testimony necessary to prove standard of care applicable to representation of client in real estate transaction).

80. 94 Mich. App. 419, 288 N.W.2d 443 (1979). For the facts of *Joos*, see *supra* note 67.

81. *Rizzo*, 520 Pa. at 502, 555 A.2d at 67. The *Rizzo* court also relied upon *Wright v. Williams*, 47 Cal. App. 3d 802, 121 Cal. Rptr. 194 (1975). 520 Pa. at 502, 555 A.2d at 67. In *Wright*, the court stated that “[i]n some circumstances, the failure of attorney performance may be so clear that a trier of fact may find professional negligence unaided by the testimony of experts.” 47 Cal. App. 3d at 810, 121 Cal. Rptr. at 200 (footnote omitted).

care.”<sup>82</sup> The Pennsylvania Supreme Court concluded that “there was sufficient nonexpert testimony to support the finding that Haines breached the standard of care by failing to investigate and inform his client of the City’s settlement offer.”<sup>83</sup>

The *Rizzo* court refused to decide whether Haines had been negligent in raising the settlement demand to \$2,000,000.<sup>84</sup> The trial court, however, stated that the “[d]efendant’s conduct in raising the demand . . . negated settlement possibilities, was a poor and negligent negotiating tactic in the midst of trial and was a substantial factor in curtailing settlement discussions and causing the . . . case to not be settled for at least \$750,000.”<sup>85</sup> The Pennsylvania Supreme Court also refused to decide the validity of the trial court’s “implicit conclusion that expert testimony was not needed to detail the approximate standard of care concerning the raising of the settlement demand.”<sup>86</sup> The court did say that “[w]hether proof of negligence arising from pretrial or trial settlement strategy is beyond the comprehension of laypersons and requires expert testimony depends on the particular facts and circumstances of the case.”<sup>87</sup>

Regarding the issue of damages, the *Rizzo* court initially noted that “when it is alleged that an attorney has breached his professional obligations to his client, an essential element of the cause of action . . . is proof of actual loss.”<sup>88</sup> The court explained that a loss is speculative, as op-

82. *Joos*, 94 Mich. App. at 424, 288 N.W.2d at 445. *Contra* *Dorf v. Relles*, 355 F.2d 488 (7th Cir. 1966) (applying Illinois law).

In *Dorf*, the plaintiff sued his attorney for malpractice alleging that the attorney failed to disclose a settlement offer and negligently conducted settlement negotiations. *Dorf*, 355 F.2d at 490. The plaintiff failed to present expert testimony as to whether the defendant, by the aforementioned conduct, failed to exercise “ordinary legal knowledge and skill.” *Id.* at 492. The Seventh Circuit found that “[i]t is not discernible how a jury, without [expert testimony], could determine what constitutes ordinary legal knowledge and skill common to members of the legal profession.” *Id.* The court also explained that “[i]f a judgment against an attorney, on a record such as is before us, can be justified, the legal profession would be more hazardous than the law contemplates.” *Id.* at 494.

83. *Rizzo*, 520 Pa. at 502, 555 A.2d at 67 (footnote omitted).

84. *Id.* at 502 n.10, 555 A.2d at 67 n.10.

85. *Rizzo v. Haines*, No. 79-623, slip op. at 21 (Pa. C.P. Phila. June 20, 1985), *aff’d in part and rev’d in part*, 357 Pa. Super. 57, 515 A.2d 321 (1986), *aff’d*, 520 Pa. 484, 555 A.2d 58 (1989). The trial judge stated that “Mr. Haines acted in bad faith and for his own aggrandizement purposes and for his own personal purposes and negligently when he arbitrarily raised the demand figure to \$2,000,000 from \$1,200,000. That demand was obviously calculated to close off discussions. The plaintiff did not authorize such increased demand.” *Id.* The Pennsylvania Supreme Court also noted that “there was . . . evidence that Haines considered the opportunity to try the case to be a cornerstone in building his reputation as a successful plaintiff’s attorney.” *Rizzo*, 520 Pa. at 494-95, 555 A.2d at 63.

86. *Rizzo*, 520 Pa. at 502 n.10, 555 A.2d at 67 n.10.

87. *Id.* (citations omitted).

88. *Id.* at 504, 555 A.2d at 68 (quoting *Duke & Co. v. Anderson*, 275 Pa.



posed to actual, "only if the uncertainty concerns the *fact* of damages rather than the amount."<sup>89</sup> The court concluded that in a legal malpractice action regarding a settlement, "one must establish that the party against whom the initial claim was asserted . . . would have reached agreement upon a settlement in an ascertainable amount."<sup>90</sup>

Haines contended that the damages in this case were speculative.<sup>91</sup>

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Super. 65, 73-74, 418 A.2d 613, 617 (1980)). The court explained that a breach of duty causing only nominal or speculative damages does not create a cause of action for negligence. *Id.* at 504-05, 555 A.2d at 68 (citing *Schenkel v. Monheit*, 266 Pa. Super. 396, 399, 405 A.2d 493, 494 (1979)).

89. *Id.* at 505, 555 A.2d at 68 (quoting *Pashak v. Barish*, 303 Pa. Super. 559, 561-62, 450 A.2d 67, 69 (1982)) (emphasis in original). The court added that "[a] verdict may be based on a calculation of damages where there is a reasonable basis for the calculation." *Id.* (citation omitted); see *Mariscotti v. Tinari*, 335 Pa. Super. 599, 602, 485 A.2d 56, 58 (1984) (client's assertion that she would have obtained greater settlement in divorce proceeding had attorney correctly valued husband's stock held speculative); *R. MALLEN & V. LEVIT*, *supra* note 2, § 580, at 730 ("When both the likelihood of settlement and the amount can be supported by evidence, then the fact of injury is no longer speculative.").

90. *Rizzo*, 520 Pa. at 505, 555 A.2d at 68 (citation omitted); see *R. MALLEN & V. LEVIT*, *supra* note 2, § 580, at 730 ("Where there were pending but un consummated negotiations . . . the client may be able to produce evidence (usually from the adverse attorney or party) of the sum which would have compromised the case."). In addition, some courts have held that proof of actual loss requires proof that the defendant in the underlying suit could have funded the settlement. See, e.g., *Whiteaker v. State*, 382 N.W.2d 112, 117 (Iowa 1986).

91. *Rizzo*, 520 Pa. at 504, 555 A.2d at 68. The court distinguished three cases advanced by Haines in support of his argument. *Id.* at 505-06, 555 A.2d at 68. In *Fuschetti v. Bierman*, 128 N.J. Super. 290, 293, 319 A.2d 781, 783 (Law Div. 1974), the plaintiff sued her attorney for malpractice because he failed to institute a suit on her behalf within the limitations period. The plaintiff contended that she lost a potential settlement of her case. *Id.* at 296, 319 A.2d at 784. The court held that "[b]ecause no expert can suppose with any degree of reasonable certainty the private blends of hopes and fears that might have come together to produce a settlement before or during trial, expert testimony as to reasonable settlement value will be excluded as irrelevant." *Id.* But see *Williams v. Bashman*, 457 F. Supp. 322, 328 (E.D. Pa. 1978) ("[T]he probability of settlement would be proved by expert testimony on the usual outcome of similar cases, including such factors as the merits of the case . . . . The same expert . . . would testify as to the settlement value of the underlying case."). The *Rizzo* court distinguished *Fuschetti* on the grounds that in *Fuschetti* there was no evidence of settlement offers or the authority of the opposing attorney to settle. *Rizzo*, 520 Pa. at 505, 555 A.2d at 68.

In *Campbell v. Magana*, 184 Cal. App. 2d 751, 753, 8 Cal. Rptr. 32, 33 (1960), the plaintiff sued her attorneys for the negligent handling of her personal injury lawsuit. The plaintiff alleged she lost the settlement value of her suit. *Id.* at 757, 8 Cal. Rptr. at 35. The court found that the only offer of settlement was for \$350, while the plaintiff demanded \$100,000. *Id.* at 758, 8 Cal. Rptr. at 36. Thus, the court held the possibility of settlement speculative. *Id.*; see *D. MEISELMAN*, *supra* note 14, § 4:1, at 54 ("Even where the attorney is negligent, such as failure to disclose an offer of settlement, no relief is warranted where the client concedes that the offer, had it been communicated by the attorney, would have been rejected."). The Pennsylvania Supreme Court distinguished *Campbell* based on the fact that in *Rizzo* "the offers and settlement authority were significantly closer." *Rizzo*, 520 Pa. at 506, 555 A.2d at 68.

The court responded by noting that the City's attorney initially had the authority to settle the case for \$300,000 plus a lifetime pension and had the authority at trial to settle for \$750,000.<sup>92</sup> The court emphasized that "firm settlement offers *were* communicated to Haines, and the attorney making the offers had the authority to settle."<sup>93</sup> Thus, the court determined that Rizzo's damages were actual, not speculative.<sup>94</sup> The *Rizzo* court also examined the trial court's award of \$300,000 in compensatory damages based on the difference between Rizzo's actual recovery and what he would have recovered in settlement but for Haines' negligence.<sup>95</sup> The *Rizzo* court concluded that this calculation was proper.<sup>96</sup>

Finally, Justice Flaherty, joined by Justice Zappala, concurred separately in a short opinion.<sup>97</sup> Justice Flaherty expressed his "concern about creating precedent which imposes liability on an attorney for a settlement strategy and for not 'second guessing' a jury or being unaware of the actual limits of authority of an opposing attorney during settlement negotiations of a civil law suit."<sup>98</sup> Justice Flaherty concluded that the majority opinion did not set such a precedent.<sup>99</sup>

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In *Whiteaker v. State*, 382 N.W.2d 112, 116 (Iowa 1986), the court held that a plaintiff seeking to recover for legal malpractice regarding settlement must prove that he and the "party against whom a claim has been asserted would have reached agreement upon a settlement in an ascertainable amount." The *Whiteaker* court held that the plaintiff's damages were speculative because there was no evidence that offers were in fact made or that the opposing counsel had authority to settle for a certain amount. *Id.* at 116-17. The Pennsylvania Supreme Court distinguished *Whiteaker* on the grounds that in *Rizzo* settlement offers were made and the City's attorney had the authority to settle the case for \$750,000. *Rizzo*, 520 Pa. at 506, 555 A.2d at 68. For the facts of *Whiteaker*, see *supra* note 67.

92. *Rizzo*, 520 Pa. at 505, 555 A.2d at 68.

93. *Id.* at 506, 555 A.2d at 68 (emphasis in original).

94. *Id.*

95. *Id.* As previously stated, the City's attorney was authorized to settle for \$750,000, and the jury awarded Rizzo \$450,000. *Id.* at 490, 494, 555 A.2d at 60, 62. Thus, Rizzo's damages were \$300,000. *Id.* at 506, 555 A.2d at 68; see D. MEISELMAN, *supra* note 14, § 4:2, at 57-58 (customary measure of damages in legal malpractice cases is amount client would have recovered but for negligence of his attorney, minus whatever he did recover).

96. *Rizzo*, 520 Pa. at 506, 555 A.2d at 69; see also *Aiken Indus. v. Estate of Wilson*, 477 Pa. 34, 44, 383 A.2d 808, 813 ("where there is a basis in the evidence for a reasonable computation of the damages suffered, . . . a verdict may be based thereon, though there may be involved some uncertainty about it; . . . nevertheless, where damages are susceptible of being proved the amount must be established with certainty") (quoting *Solar Elec. Corp. v. Exterminator Corp.*, 384 Pa. 233, 235, 120 A.2d 533, 534 (1956)) (citations omitted), *cert. denied*, 439 U.S. 877 (1978).

97. *Rizzo*, 520 Pa. at 513, 555 A.2d at 72 (Flaherty, J., concurring).

98. *Id.* (Flaherty, J., concurring).

99. *Id.* (Flaherty, J., concurring). Certainly, the communication and investigation of settlement offers cannot be viewed as settlement strategy. See R. MALLEN & V. LEVIT, *supra* note 2, § 580, at 725 (not identifying such as settlement strategies). Furthermore, *Rizzo* does not hold an attorney liable for being una-

## III. ANALYSIS

It is respectfully submitted that the Pennsylvania Supreme Court correctly decided *Rizzo v. Haines*. First, the three-element test adopted by the court for proving a legal malpractice claim has been adopted by the majority of the states and is partially based on the court's own prior decisions.<sup>100</sup> Because of the importance of settlement to the judicial system and litigants, requiring an attorney to exercise ordinary skill and knowledge in the conduct of settlement negotiations was mandated.<sup>101</sup> Furthermore, the requirement that all settlement offers be communicated to the client is proper in light of precedent that requires an attorney to have the client's permission before settling a case.<sup>102</sup> This requirement is also supported by the newly adopted Pennsylvania Rules of Professional Conduct.<sup>103</sup> In addition, because informing clients of settlement offers would be of little utility otherwise, the court quite properly required attorneys to investigate settlement offers.<sup>104</sup> Because an attorney's duty to investigate and communicate settlement offers is simple and straightforward, *Rizzo* correctly held that proving the breach of those duties does not require expert testimony.<sup>105</sup>

Although the *Rizzo* court failed to decide the issue, it is submitted that an attorney who unreasonably increases a settlement demand is negligent.<sup>106</sup> By such conduct an attorney precludes any chance of settlement just as surely as the attorney who refuses to negotiate in the first

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ware of the limits of his opponent's settlement authority, but for the failure to investigate settlement offers. *Rizzo*, 520 Pa. at 501, 555 A.2d at 66.

100. See *Rizzo*, 520 Pa. at 499, 555 A.2d at 65. For a discussion of this test, see *supra* notes 55-60 and accompanying text.

101. See *Rizzo*, 520 Pa. at 499-500, 555 A.2d at 65. For a discussion of the requirement of ordinary skill and knowledge in the conduct of settlement negotiations, see *supra* notes 61-70 and accompanying text. For a discussion of the importance and validity of settlement agreements, see *supra* notes 17-26 and accompanying text.

102. See *Rizzo*, 520 Pa. at 500-01, 555 A.2d at 66 (citations omitted). For a discussion of an attorney's duty to communicate settlement offers, see *supra* notes 66-67 and accompanying text. For a discussion of the requirement that an attorney have his client's permission to settle a case, see *supra* notes 27-35 and accompanying text.

103. See PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT Rule 1.4 comment (1987) ("A lawyer who receives from opposing counsel an offer of settlement in a civil controversy . . . should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable.") (citation omitted). For a further discussion of the Pennsylvania Rules of Professional Conduct, see *supra* note 67.

104. See *Rizzo*, 520 Pa. at 501, 555 A.2d at 66 (citations omitted). For a discussion of an attorney's duty to investigate settlement offers, see *supra* notes 68-70 and accompanying text.

105. See *Rizzo*, 520 Pa. at 501-02, 555 A.2d at 66. For a discussion on the general requirement of expert testimony and the court's refusal to require its use in *Rizzo*, see *supra* notes 76-83 and accompanying text.

106. The trial court in *Rizzo* found that Haines increased the settlement demand not in *Rizzo*'s best interests, but to serve his own purposes. For a discus-

instance. Attorneys have been found negligent for conduct which resulted in the failure of a case to settle. For example, in *Smiley v. Manchester Insurance & Indemnity Co.*<sup>107</sup> the Illinois court held an attorney liable for negligently failing to settle a case.<sup>108</sup> The court found that the attorney's failure to make a settlement offer or otherwise attempt settlement resulted in excessive liability for the client.<sup>109</sup> Relying on expert testimony, the *Smiley* court determined that this conduct violated the duty of care owed to the client.<sup>110</sup> Finally, the purposes of settlement will be frustrated if attorneys can be held liable for refusing to negotiate settlements, but not for unreasonably increasing settlement demands when both actions result in the preclusion of settlement.<sup>111</sup>

It is also submitted that proving an attorney breached the standard of care by raising a settlement demand requires expert testimony. "Expert testimony is required when the malpractice issue concerns tactical and judgmental matters."<sup>112</sup> The trial court in *Rizzo* concluded that

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sion of the trial court's findings in this regard, see *supra* note 85 and accompanying text.

107. 49 Ill. App. 3d 675, 364 N.E.2d 683 (1977), *aff'd*, 71 Ill. 2d 306, 375 N.E.2d 118 (1978). In *Smiley*, the defendant attorney was authorized to settle a case up to a certain dollar amount. *Id.* at 678, 364 N.E.2d at 686. He never communicated this authority to the opposing counsel, nor did he ever attempt to settle the case. *Id.* at 678-79, 364 N.E.2d at 686. After an adverse verdict in excess of the amount for which the defendant was authorized to settle, his client sued him for legal malpractice. *Id.* at 679, 364 N.E.2d at 687.

108. *Id.* at 680, 364 N.E.2d at 687.

109. *Id.*

110. *Id.*; see also *Outboard Marine Corp. v. Liberty Mutual Ins. Co.*, 536 F.2d 730 (7th Cir. 1976) (applying California law) (attorney held negligent for actions which prevented settlement of case that would otherwise have settled); *Schlossberg v. Epstein*, 73 Md. App. 415, 432-37, 534 A.2d 1003, 1012-14 (1988) (attorneys who refused to settle case without being fully informed may be held negligent for failure to settle).

While there are no reported cases regarding whether the unreasonable raising of a settlement demand can constitute negligence, an artificially high settlement demand has been recognized as a legitimate settlement tactic, at least when used early in the negotiation process. C. CRAVER, *supra* note 18, at 116 ("[it] behooves bargainers to commence their [settlement negotiations] with high demands"); H. MILLER, *supra* note 17, § 5.07 (It is recommended that "in the early stages of negotiation, before settlement talks begin in earnest, that the settlement demand be high."). It is clear, however, that Haines set forth a high settlement demand late in his negotiations with the City. It must also be noted that events during the trial may legitimately increase the settlement value of a case.

111. For a discussion on the importance of settlement, see *supra* notes 19-22 and accompanying text.

112. R. MALLEN & V. LEVIT, *supra* note 2, § 665, at 839 (footnote omitted). Expert testimony is also required regarding the possible negligence of "decisions concerning whether and in what manner to settle the claim." *Id.* (footnote omitted). As the Pennsylvania Superior Court recently explained:

Legal malpractice claims run a wide gamut of circumstances from clear cut claims of a breach of an attorney's duty for allowing the statute of limitations to run against the former client's cause of action to the com-

Haines' raising the settlement demand was a negotiation tactic.<sup>113</sup> Additionally, in *Gans v. Mundy*<sup>114</sup> the Third Circuit determined that a plaintiff must use expert testimony to prove that his attorneys were negligent for failing to sue an additional party.<sup>115</sup> The court concluded that the decision not to sue was a "strategic one" and held that whether the attorneys breached the standard of care with this decision required expert testimony.<sup>116</sup> Furthermore, in the majority of cases dealing with the negligent conduct of settlement negotiations, as opposed to the straightforward failure to investigate or communicate settlement offers, the courts have required expert testimony.<sup>117</sup> Therefore, because raising a settlement demand is a tactical decision, and is not "so simple [that any] lack of skill [is] so obvious," expert testimony is required to prove breach of the standard of care.<sup>118</sup>

#### IV. CONCLUSION

By following the guidelines set forth in *Rizzo*, attorneys engaged in

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plex determination required of a claim of breach of duty involving the attorney's choice of trial tactics in which a layperson's judgment obviously requires guidance. Between these two extremes lie a myriad number of legal malpractice actions for which the necessity of expert evidence to establish the attorney's duty and breach thereof will not be readily evident without careful examination of the factual circumstances upon which they arise.

*Storm v. Golden*, 371 Pa. Super. 368, 376-77, 538 A.2d 61, 65 (1988) (footnote omitted).

113. *Rizzo v. Haines*, No. 79-623, slip op. at 21 (Pa. C.P. Phila. June 20, 1985), *aff'd in part and rev'd in part*, 357 Pa. Super. 57, 515 A.2d 321 (1986), *aff'd*, 520 Pa. 484, 555 A.2d 58 (1989).

114. 762 F.2d 338 (3d Cir.) (applying Pennsylvania law), *cert. denied*, 474 U.S. 1010 (1985). In *Gans*, the plaintiff was injured when his employer's bus collided with a bus owned by the South Eastern Pennsylvania Transportation Authority (SEPTA). *Id.* at 340. The defendant attorneys filed suit against the employer, but not against SEPTA. *Id.* The plaintiff alleged that their failure to sue SEPTA was negligent. *Id.*

115. *Id.* at 343.

116. *Id.* at 343-44.

117. *See, e.g.*, *Applegate v. Dobrovir, Oakes & Gebhardt*, 628 F. Supp. 378, 382 (D.D.C. 1985) (legal and practical difficulty of second-guessing propriety of eve-of-trial settlement required expert testimony), *aff'd without opinion*, 809 F.2d 930 (D.C. Cir.), *cert. denied*, 481 U.S. 1049 (1987); *Smiley v. Manchester Ins. & Indemnity Co.*, 49 Ill. App. 3d 675, 680, 364 N.E.2d 683, 687 (1977) (expert testimony necessary with respect to determination of negligence regarding attorney's failure to attempt settlement), *aff'd*, 71 Ill. 2d 306, 375 N.E.2d 118 (1978); *Pongonis v. Saab*, 396 Mass. 1005, 1005, 486 N.E.2d 28, 29 (1985) (expert testimony necessary to establish that attorney negligently advised client to accept settlement offer). *See generally* Annotation, *supra* note 76, at 198-200.

118. *See Lentino v. Fringe Employee Plans, Inc.*, 611 F.2d 474, 480 (3d Cir. 1979) (applying Pennsylvania law) (Expert testimony is required to establish the standard of care and whether it was complied with "except where the matter under investigation is so simple, and the lack of skill so obvious, as to be within the range of the ordinary experience and comprehension of non-professional persons.") (citations omitted). For the facts of *Lentino*, see *supra* note 78.

settlement negotiations in Pennsylvania can avoid liability and better serve their clients. First, whenever an attorney receives a settlement offer, he or she must investigate it.<sup>119</sup> This duty merely requires obtaining or reasonably attempting to obtain from the offering attorney details as to what the offer encompasses.<sup>120</sup> In *Rizzo*, this meant only that Haines had a duty to take reasonable steps to determine exactly what the City's pension offer entailed.<sup>121</sup> Haines met this duty simply by writing the City's attorney in request for specific information on the pension.<sup>122</sup> The duty to investigate also requires that an attorney respond to any indications by opposing counsel that a higher settlement amount can be offered.<sup>123</sup>

Second, whenever an attorney receives a settlement offer, he or she must communicate it to the client after investigating it.<sup>124</sup> An attorney should first investigate and then communicate a settlement offer because the client may seek advice on whether the offer should be accepted.<sup>125</sup> Furthermore, what may later prove to be poor advice could lead to a legal malpractice suit.<sup>126</sup> Additionally, it is clear that settlement offers should be either confirmed or communicated to the client in writing.<sup>127</sup> This is because "[w]here the issue is the alleged uncommunicated [settlement] offer, the case usually becomes a battle of credibility that the lawyer, if he lacks documentation or court transcription, is likely to lose."<sup>128</sup>

In conclusion, if an attorney simply investigates and communicates

119. See *Rizzo*, 520 Pa. at 501, 555 A.2d at 66.

120. See *id.*

121. *Id.*

122. *Id.* It should be remembered that Haines could have asked the City's attorney what the pension offer entailed when it was made at the pretrial settlement conference. See *id.* at 493, 555 A.2d at 62. This is the better practice since it will guarantee not only a response, but an immediate response. Although Haines met his duty to investigate by writing to the City's attorney, he never received a reply. *Id.* at 493, 501, 555 A.2d at 62, 66.

123. See *id.* at 501, 555 A.2d at 66.

124. See *id.*

125. D. MEISELMAN, *supra* note 14, § 10:7, at 173; see PENNSYLVANIA RULES OF PROFESSIONAL CONDUCT Rule 1.4(b) (1987) ("A lawyer shall explain a matter to the extent necessary to permit the client to make informed decisions regarding the representation.").

126. See R. MALLIN & V. LEVIT, *supra* note 2, § 580, at 724; see also *Fishman v. Brooks*, 396 Mass. 643, 646, 487 N.E.2d 1377, 1379 (1986) ("[A]n attorney is liable for negligently causing a client to settle a claim for an amount below what a properly represented client would have accepted.") (citations omitted).

127. R. MALLIN & V. LEVIT, *supra* note 2, § 12, at 33 ("If the attorney regularly discusses matters in person and by telephone with his client, he should confirm these discussions and significant events in writing, and forward pertinent documents on a regular basis."); Grasso, *Defensive Lawyering: How to Keep Your Clients from Suing You*, A.B.A. J. 98, 98 (Oct. 1989) ("An attorney's thin file becomes a fat target in an action for legal malpractice.").

128. Grasso, *supra* note 127, at 98.

settlement offers, that attorney will help to avoid the possibility of a legal malpractice suit and will better serve the client with respect to settlement.

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